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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 667

ORO FINO CONSOLIDATED MINES, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Oro Fino Consolidated Mines, Inc., by its attorney, Prew Savoy, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, ordered to be entered in the above-entitled case on October 2, 1950 (R. 4, 15), and finally entered January 9, 1951. (R. 15).

Opinion Below

The opinion of the United States Court of Claims was rendered October 2, 1950. (R. 4).

Jurisdiction

The decision of the Court of Claims in this case was handed down on October 2, 1950. (R. 4). Petition for rehearing was filed October 23, 1950. (R. 15). This petition

was overruled by the Court of Claims on January 9, 1951. (R. 15). Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1255 (1).

Question Presented

The legal liability of the United States to pay just compensation for exclusive rights exercised by it in the purported interest of national defense over the property of the Plaintiff during the period October 8, 1942, to June 30, 1945. (R. 2, 3).

Constitution and Regulations Invoked

The Fifth Amendment to the Constitution of the United States—"* * * no person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Limitation Order L-208 issued October 8, 1942, by the Director General of Operations, War Production Board, under the Title "Part 3093—Gold Mining"[1] reads in part—

> "The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.
>
> "Sec. 3093. Limitation Order L-208—(a) Definitions. For the purposes of this order, 'nonessential mine' means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial

[1] This heading was later amended to read: "Part 3201—Mining" (8 F. R. 12007).

number for such enterprise which has been issued under Preference Rating Order P-56.

"(b) Restrictions upon production. (1) On and after the issuance date of this order, each operator of a non-essential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine." (7 F.R. 7992-7993).

Statement of Facts

The essential facts as disclosed in the record, on which this case is based may be stated as follows: For a number of years prior to 1942 and on all pertinent dates, the Petitioner, and its predecessors-in-title, was the sole and lawful owner and operator of the gold mining property known as the Oro Fino Mine, located in the Ophir Mining District, Placer County, California. (R. 1). The said property was, up to October, 1942, being successfully operated to the financial benefit of the owner, giving employment to some 30 to 40 miners in the production of lode gold. (R. 2). On October 8, 1942, the War Production Board, a highly important agency of the Government, functioning during World War II, issued Limitation Order L-208, in which it held that gold mining was an "unessential" industry, and accordingly, ordered the closing down of such gold mines. (R. 3). This order, as found by the Court, "was a wartime measure, designed and intended to divert gold miners into the more essential field of copper mining." (R. 7). Despite its earnest protests, this Petitioner proceeded to carry out the provisions of the Order, L-208, and by January 18, 1943, completely closed down its mine and suspended all mining operations. (R. 3). This order was the only one of its kind issued that completely closed down an industry. As the result of such closing down the Petitioner suffered material damages, loss of opportunity to continue its business enterprise, and was put to material expense in at-

tempting to protect its property. The order remained in full force and effect until its revocation by the War Production Board on June 29, 1945, as of June 30, 1945. (R. 3). This Order is published in 10 F.R. 8110.

As the result of the exercise by the Government of the complete control of the property of this Plaintiff for a period of over two and three-quarter years, its beneficial property rights were completely destroyed and in addition it was compelled to expend substantial sums of money in an endeavor to properly protect the property in question. (R. 3). As the result of its observance of the order, this Petitioner has not been able, since its revocation, to resume active operations on its property.

Specification of Errors to Be Urged

The Court of Claims erred:

(1) In holding that, upon the facts established, petitioner is not entitled to just compensation, as for confiscation of its property and rights, on account of the losses sustained by it, by reason of Limitation Order 208, under the Fifth Amendment to the Constitution.

(2) In failing to hold that petitioner is entitled to recover, from the United States, just compensation, on account of the losses sustained by it, by reason of Limitation Order 208, under the Fifth Amendment to the Constitution.

Reasons for Granting the Writ

It is a fundamental principle, under the Fifth Amendment to the Constitution, that "no person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The facts in the case at bar, it is submitted, clearly establish that Limitation Order 208 amounted to confiscation, for

the life thereof, of the Oro Fino Mines, for which the Fifth Amendment requires just compensation.

The sound basis for granting the Writ is based on the broad national importance of the question involved—a question that has not been finally decided, which is one that requires answer by the Court of last resort. This is based on the following points:—

(1) from historical and economic considerations, the gold mining industry has always been recognized as one of the most important in the country. As the result of the Order of the WPB, L-208, *the only one of the character issued*, practically all gold mines in the country were closed down during the life of the order. This seriously affected the economy of the eleven Western States, and Alaska, where the gold mining industry was of the greatest importance, and where the large majority of the gold mines are located;

(2) the extent to which a general power of the character set out in the order may be exercised in affecting *other industries*—for example: an order of this character might be issued closing all newspaper plants;

(3) the fact that certain warpowers are still in effect although hostilities have been over for more than five years;

(4) the fact that important controls are still being exercised although there is no declared war going on;

(5) the fact that controls can be continued or new controls established by reason of action taken by the United Nations, uncontrolled by the Congress—all in the name of national welfare—to the extinction of an industry and material damage to individuals;

(6) the application of the Fifth Amendment is extremely important, and just compensation is imperative, if controls, in the name of the national welfare, are to result in virtual confiscation of property rights, even though there may be no physical seizure of the property; in the instant case the Order amounted to a destruction, during the life thereof, of practically all gold

mining properties, including the Oro Fino property, in the name of the general welfare, to the extinction of gold mining and the termination during the life of the Order of property rights of individuals. Such action requires compensation as much as a physical seizure of property requires just compensation.

(7) Clarity on these points is required, before other industries are as effectually destroyed, or this industry is further ruined, as could be done under the decision of the Court of Claims.

Conclusion

For the reasons stated, it is respectfully submitted, that this Petition for a Writ of Certiorari should be granted.

PREW SAVOY,
Attorney for Petitioner.

April 9, 1951.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Summary of Argument

The principles to which this Brief is addressed are, as follows:

(1) That a statute or a governmental regulation, similar to Limitation Order L-208, *the only one of its kind issued by the War Production Board during the War,* may become an expropriation of private property for which just compensation, under the Fifth Amendment, is required, is established by the decisions of the courts, under *Pa. Coal Co.* v. *Mahon,* 260 U.S. 393; *C., R. I. P.* v. *United States,* 284 U.S. 80; *Royal Holland Lloyd* v. *United States,* 73 C. Cls. 722; and other cases cited below.

(2) That the fact that it is not necessary for the Government to take physical possession of the property involved, in order to entitle the owner thereof to just compensation, under the Fifth Amendment, is well established by the courts. See particularly *Wm. Wrigley, Jr. Co.* v. *United States,* 75 C. Cls. 569; *Atwater* v. *United States,* 106 C. Cls. 196; *Berwind-White Coal Mining Co.* v. *United States,* 9 F. (2) 429; *Ex parte Kelso* 147 Calif. 609, quoted in *Hadacheck* v. *Sebastian,* 239 U.S. 334, and other cases cited below.

(3) That it cannot, in logic, be successfully maintained that, under the guise of a mere set of regulations, even issued by a highly important agency of the Government, such an old, honorable and vital industry as gold mining may be arbitrarily closed down on the theory that it is operating a "nonessential" industry.

Preliminary Statement

The formal requirements of the Brief are all to be found in the Petition, which this Brief accompanies, and are not repeated herein.

Argument

The United States, by Limitation Order L-208, effectively confiscated the gold mine of this Petitioner, and the Petitioner is entitled to just compensation, on account of the resultant expenditures, damages and losses, under the Fifth Amendment to the Constitution.

1

When property is taken from one person, for the benefit of the General Welfare, just compensation therefor is required, under the Fifth Amendment to the Constitution, even when taken under the guise of a regulation.

There is a definite limit to the powers of a government to regulate, even by Statute, the lawful use of private property by the owner. This fact was recognized by this Court, in the case of *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393. Here the Court reversed a decision of the Supreme Court of Pennsylvania, sustaining the constitutionality of an Act of the State Legislature making it unlawful, "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse or subsidence of * * *; (d) any dwelling used as a human habitation; * * *." The property there involved had been sold by the coal company, that at the time of the sale expressly reserved to itself the right to mine the coal underlying the surface of the land sold. Suit to restrain the mining operation was instituted by the surface owner, who was successful in the state courts. On appeal to this Court, the decision of the State Supreme

Court was reversed in a decision by Mr. Justice Holmes. In the course of the opinion the Court said that—

> "* * * As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.
>
> "* * * One fact for consideration in determining such limits is the extent of the diminution. Where it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. * * *" The greatest weight is given to the judgment of the Legislature, but it always is open to interested parties to contend that the Legislature has gone beyond its constitutional power." (260 U.S. 393, 413.)

Again the Court says:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking * * *. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (id. p. 415.)

The language of this opinion may well be paraphrased as follows to fit the situation in the case at bar—

The regulations contained in the Order L-208 go so far as to hold that they, in effect, are a temporary taking of the property, that justly entitle this Petitioner to receive just compensation for the period that such property was under the control of the United States, acting through the War Production Board. Otherwise, we would be forgetting that the strong need for providing for the national defense of the nation does not "warrant achieving" that purpose "by a shorter cut than the constitutional way of paying

for the change." In other words, the general benefit accruing to the nation by the steps taken pursuant to the regulations should be divided equitably among all the citizens of the country, each one of whom was vitally interested in providing for the national protection.

The same principle is recognized in the case of the *C., R.I. and P.* v. *United States,* 284 U. S. 80, 96, where the opinion reads—

> "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title. * * * The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment. * * * And certainly a regulation permitting the free use of property in the face of an express finding that the owner is entitled to compensation for such use cannot be regarded otherwise than as arbitrary and unreasonable."

The Court, in its opinion, cites with approval, among other cases, the case of *Reagan* v. *Farmers' Loan and Trust Co.* 154 U.S. 362. This case involved questions raised under the Act of the Texas Legislature establishing a railroad commission. In the course of the opinion by Mr. Justice Brewer, in the *Reagan* case, the following principles are laid down:

> "* * * The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the

property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title, but the use for the public benefit at less than its market value?" (154 U.S. 362, 410.)

Again the opinion reads—

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. * * *" (id. p. 412.)

The extent to which regulation of property may go is well exemplified in the case of the *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398. This case involved the constitutionality of the Minnesota Mortgage Moratorium Law, approved April 15, 1933, (Laws of Minn., 1933, p. 514) where the Supreme Court upheld the Law on the ground that the law in question, while affecting the rights of the mortgagee, nevertheless, provided *just compensation* for all concerned. In its opinion, the Court has this to say—

"* * * The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, * * *. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession he must pay the rental value * * *. The rental value so paid is devoted to the carrying of the property by the appli-

cation of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period." (id. p. 425.)

Again the Court very pertinently says—

"* * * the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully and thus it permits of the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limits safeguarding essential liberties * * *." (id. p. 426.)

"* * * The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession." (id. 445.)

Thus, while upholding the right of the State in time of national emergency to temporarily impair the obligation of contracts, the Statute definitely provides for *just compensation* to all parties having a direct interest in the subject matter.

That the owner of property, temporarily used by the United States is entitled to just compensation on the same principle as if title thereto had been taken by the United States, is recognized in *United States* v. *General Motors*, 323 U.S. 373; also *United States* v. *Petty Motor Co.*, 327 U.S. 373.

This principle is also recognized in the case of the *Royal Holland Lloyd* v. *United States*, 73 C. Cls. 722, involving a question closely analogous to the question involved in the case at bar. The *Royal Holland Lloyd* case involved the

detention of the S.S. Zeelandia in the Port of New York from October 22, 1917, to March 30, 1918, when the use of the vessel was requisitioned by the United States for war purposes.

The Court had no difficulty in finding that such action on the part of the United States gave rise to a claim for *just compensation* under the Constitution. The opinion reads in part, as follows:

> "* * * the Zeelandia was detained for the primary purpose of having the vessel for use by the United States or to be placed at the disposal of the allies of the United States. The primary interest of the United States was in the vessel itself, not in her cargo or stores." (id. p. 471)

Judgment was given in the amount of slightly less than $450,000, being compensation for the use made by the United States of the vessel from the day of detention until the vessel was formally requisitioned.

As was said by Mr. Justice Brewer in his dissenting opinion in the case of *C. B. & Q. Ry.* v. *Drainage Commission of Ill.* (200 U. S. 561)—

> "If it be a principle of natural justice that private property shall not be taken for public use without just compensation, is it not equally a principle of natural justice that no man shall be compelled to pay out money for the benefit of the public without any reciprocal compensation? What difference in equity does it make whether a piece of land is taken for public use or so many dollars for like purposes?" (id. p. 599)

In his concurring opinion in this case, Mr. Justice Holmes makes the following sage remark—

> "I suppose it to be plain, as my brother Brewer says, that, if any expense is thrown upon the railroad unlawfully, its property is taken for public use without just compensation." (id. p. 595)

2

Physical Occupancy Not Necessary

The Court below in its opinion says—

> "Order L-208 had the tenor of a temporary restriction. It was a war measure and was not intended to operate as a permanent restriction, * * *. It is clear that a taking was not intended. * * * The Government did not take over or use Plaintiff's land. * * * Title and possession remained in Plaintiff. * * *" (R. 14)

That physical occupancy by the United States of property affected is not necessary to constitute such a "taking" as will entitle the owner to just compensation under the Fifth Amendment to the Constitution is recognized by the courts.

In the case of *Wm. Wrigley Jr. Co.* v. *United States,* 75 C. Cls. 569, Plaintiff held four separate leases to space in the Bush Terminal Building, Brooklyn, New York, which space was used in the manufacture of its product. In June, 1918, the Navy Department notified the Bush Terminal Building Co. (copy of letter to Plaintiff) that it would commandeer the leased premises and take possession on or before December 1, 1918. Pursuant to this notice Plaintiff purchased in August, 1918, other property for its manufacturing plant that was to be vacated in accordance with notice from the Navy Department. In September, 1918, Plaintiff started moving equipment to the new location. This move, however, was not completed until the latter part of January, 1919. In the meantime, Plaintiff was notified by the Navy Department on September 13, 1918, that its commandeer order had been cancelled as of September 9, 1918, and accordingly, the Navy Department would not need the premises.

Plaintiff brought suit "to recover just compensation for the taking of its leasehold interest". Judgment was handed

down by the court covering the value of the unexpired portion of the lease of Plaintiff.

In the course of its opinion, the Court said that—

> "It is true that the Navy Department did not enter into physical possession at any time of the space leased by the plaintiff, but, due to the commandeer order, the plaintiff was forced out of its leaseholds and compelled to seek other premises. It was in compliance with the commandeer order that the plaintiff acted in good faith to deliver the premises. Ever since the decision of the Supreme Court in Ducket & Co. v. United States, 266 U. S. 149, and Phelps v. United States, 274 U. S. 341, it has been settled law that the use of property can be taken as well as title to the property and for the use, just compensation must be paid * * *." (id. pp. 580, 581)

Again the Court says—

> "Under the statutes physical possession was not necessary to validate such an expropriation. In fact, in many cases, there was never any physical possession. The *nature of the case* did not always require it, nor was it contemplated. The regulation itself with its attendant notice, transferred the contract and the contractual rights, and it was obligatory." (id. p. 582) (Emphasis supplied.)

See also to the same effect three other cases involving Bush Terminal properties—*Thermal Syndicate* v. *United States,* 81 C. Cls. 446; *Crystal* v. *United States,* 81 C. Cls. 461; and *Howard* v. *United States,* 81 C. Cls. 646.

In the case of *Atwater* v. *United States,* 106 C. Cls. 196, Plaintiff owned "a barren stretch of typical sand beach covered with driftwood" containing about 38 acres located on the southern shore of Long Island. In 1942 the United States established an aerial gunnery range in the vicinity of the property and offered the owner a nominal rental. This

offer, however, was rejected by the Plaintiff. The government, nevertheless, erected signs warning all persons to keep out of the safety zone area that included Plaintiff's property. The Court found that the owner was entitled to a fair and reasonable compensation for the use thus made of the property. In the course of its opinion, the Court said:

> "The taking, however, was not that of actual physical occupancy by agents of defendant, except for patrol. And neither the plaintiffs themselves, nor any other representing them, physically occupied the premises at the time of taking. * * *
>
> "It is not asserted by the plaintiff that the conduct of defendant's officials was tortious; that they acted without authority. Nor is there any contention that the use for which the taking was directed was not a public use.
>
> "The United States may exercise the right of eminent domain upon an estate less than the fee simple. * * * The United States may also create, by the act of taking, a leasehold that did not exist before, with itself as leasee. Johnson v. United States, 2 C. Cls. 391, 8 id. 240." (id. p. 206)

May it be said with any degree of logic or equity that such exercise by the Government of the complete control of the property right of this Petitioner for a period of some two and three-quarter years is not such a control that entitles the owner to just compensation under the Fifth Amendment to the Constitution? The record clearly establishes the fact that the Petitioner was deprived not only of the financial benefits inuring to it under its title, but was also put to great expense in attempting to prevent so far as it was able any physical deterioration in the property.

3

Reversible Errors in Opinion of the Court Below

The Court below found that—

> "Plaintiff was put to expense in complying with an Order of the sovereign. But since the Order did not, in our opinion, result in a taking of private property for public use, we must hold that plaintiff has no cause of action against the United States. Although Order L-208 imposed a restriction upon the use of private property, we hold that it was a regulation rather than a taking, a regulation which was permissible because the national safety demanded it, and which was valid under the war power." (R. 15)

This conclusion of the Court is based on an earlier statement in the opinion that—

> "The question raised by defendant's second ground of demurrer is whether the Government through Order L-208 took plaintiff's property. The Government contends that it did not, that the issuance of the order was an exercise of the war power for the effects of which it is not liable." (R. 9)

In support of this statement there are cited by the Court two articles (R. 9-10) from law school magazines and a number of decisions of the courts.

It is respectfully submitted that a reading of the two articles referred to by the Court establish, to a great extent, the contention of the Petitioner in this case that there was such a taking of the property within the purview of the Fifth Amendment to the Constitution as to entitle the owner to just compensation for the use made of the property by the Government under Order L-208. It must be borne in mind that the only right the Petitioner had in this property was to mine the gold in the ground (R. 1-2). During the life

of the order the Petitioner was not only prevented from receiving any financial benefits from the mining of gold for a period of about two and three-quarter years, but was likewise "put to expense in complying with an order of the sovereign" (R. 15).

Abels, "Price Control in War and Emergency", 90 U. of Pa. L. Rev. 670, 676, specifically recognizes the distinction between regulation and requisition in the following language:

> "It is obvious that any restriction on property insofar as it inflicts damage or diminishes the return from the property is *pro tanto* taking of the property. Thus viewed from the standpoint of the individual, regulation and taking, though supposedly different in kind, are only different in degree. This problem as to how far substantial damage can be inflicted in the exercise of the regulatory powers without compensation is one that has disturbed judicial thought.
>
> "Mr. Justice Holmes in Pa. Coal Co. v. Mahon, in 1922, [260 U. S. 393, 413] extending a line of thought expressed in Block v. Hirsch, [256 U. S. 135] in the previous year, stated that when the damage 'reaches a certain magnitude', in most, if not all cases, there must be an exercise of eminent domain and compensation to sustain the act."

Marcus, "The Taking and Destruction of Property Under a Defense and War Program", 27 Corn. L. Q. 317, 515, 516, in discussing the difference between regulation and requisition reaches substantially the same conclusion, as is evidenced by the following quotation:

> "The substantiality of the injury appears to be an important element in deciding whether there has been an exercise of the eminent domain power or the police power. . * * * The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking * * *.

> "• • •. The line between expropriation and regulation is often very misty; but in the main, if the claimant can show no particular injury than that suffered by other members of the public, and no physical appropriation by the Government, a 'regulation' rather than a 'taking' is likely to be found."

A principal case relied upon by the court below in reaching its conclusion is of *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271 certiorari denied, 355 U. S. 815 (R. 14, 19).

The *St. Regis* case involved the "General Preference Order No. M-251" (7 F.R. 824) relating to raw material used in the manufacture of pulp wood. The Order was issued by the same board issuing Order L-208. The pulp wood order read, as follows:

> "No holder of pulp wood, as defined in Item 3 of Paragraph (d) of M-251, shall consume, process, or deliver any such pulp wood except upon specific authorization or direction of the Director General of Operations."

The Court below, as was done in the instant case, sustained a demurrer to the petition in the *St. Regis* case, although it recognized that the *St. Regis* case "is a case of actual hardship" (110 C. Cls. 271, 279).

It may be pointed out that the clear distinction between the *St. Regis* case and the case at bar is that in the former there was no order closing the plant. The order merely involved the right of the Government, in the promotion of national defense, to allocate raw material in such manner that the material could best be used in the national emergency confronting the country. It did not purport in any way to take over the plant or to deprive the owner of any raw material. It was issued merely for the purpose of controlling the distribution of the raw material in such manner as to be most advantageous to the national defense.

In the case at bar, Limitation Order 208, that, so far as the record indicates, was the only order of its character issued by the Board, not only classified the plaintiff's gold mining property as a "nonessential mine" but ordered its immediate closing down for the period of the life thereof, namely, October 8, 1942, to June 30, 1945. As found by the Court, "The Order was a wartime measure designed and intended to divert gold miners into the more essential field of copper mining" (R. 7).

That there is a dividing line between a Regulation issued by authority of the Government, covering the use or control of private property, and such use of private property, under the guise of a Regulation, as to entitle the owner to *just compensation* under the Fifth Amendment is fully recognized by the courts.

The case of *Berwind-White Coal Mining Co. et al.* v. *United States,* 9 F.(2) 429-448, involved the legality of the Interstate Commerce Commission regulation that required the distribution of privately owned freight cars for distributing the product of the mines among users of coal.

The Court held that the order was beyond the power of the ICC to issue for the reason that:

> "The railroads will be deprived of the use of their mines and of their right to exercise their judgment in procuring their coal supply, and the other Plaintiffs of the use of their mines and their private cars." (id. p. 448).

The opinion continues:

> "Private property cannot be taken for public use without just compensation, and cannot be taken for private use, with or without compensation. The owners of private cars have acquired valuable property rights in order to carry on vast industries, * * *, in reliance upon the assigned car rule, and, as the order in question necessarily makes no provision for compensating

the owners for the deprivation of their property, it is manifest that its effect is the taking of property without compensation, and in violation of the Fifth Amendment to the Constitution.

"* * * that it (the Order) is confiscatory in violation of the Fifth Amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars: that the order is therefore beyond the authority of the Commission, without warrant of law, and null and void" (id. p. 448).

In the case of *Cincinnati* v. *Louisville and Nashville Railroad,* 223 U.S. 390, 404, the court quotes with approval the following from *United States* v. *Jones,* 109 U.S. 513, 518:

"The provision found in the Fifth Amendment to the federal Constitution * * * for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised * * *".

4

Cases Cited in Opinion

The opinion in *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398, cited by the Court (R. 10), sustaining the constitutionality of the Minnesota Mortgage Moratorium Law that extended the period of redemption of mortgages, is very careful to point out that:—

"* * * While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period." (290 U.S. 398, 425).

In the same opinion the Court has the following to say in regard to the exercise by the Government of its war powers:—

> "* * * the warpower of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage was successfully and thus it permits of the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the warpower does not remove constitutional limitations safeguarding essential liberties * * *." (id. p. 426).

The Court is careful to point out that all parties concerned receive *just compensation* under the provisions of the Act, saying:—

> "* * * the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings, and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of the possession * * *." (id. p. 445).

In the case at bar the situation is materially different in that the Petitioner's gold mine was for a period of some two and three-quarter years completely closed down, and, in addition, Petitioner not only was deprived of the financial returns from operating the mine, but it was also put to

material expense in the reasonable protection that it was compelled to afford the property.

The case of *Yakus* v. *United States*, 321 U.S. 414, 431, cited in opinion (R. 10) is readily distinguishable from the case at bar. In the *Yakus* case, the Petitioners were involved in a prosecution for failure to comply with Regulations issued under the Emergency Price Control Act of January 30, 1942, as amended (50 U.S.C.A. Appx. 924). They contended that to do so would require them as wholesalers "to sell beef at such prices as would render it impossible for wholesalers * * * to conduct their business other than at a loss." (id. p. 431).

In sustaining the constitutionality of the Act the Court said:—

> "The petitioners are not confronted with the choice of abandoning their businesses or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation's validity." (id. 438).

In the case at bar, instead of the Regulations providing a plan under which the Petitioner could continue its mining operations, the only property right it had, classified the property as "nonessential," and directed, under penalties, the closing of the mine.

In the case of *Hadacheck* v. *Sebastian*, 239 U.S. 394, cited in the opinion (R. 11) involving the extent to which a police regulation may go, the Court indicated the limit to which such a regulation is restricted. The regulation in question was one that prohibited brickyards within certain areas of the city. This was held to be within the lawful power of the city. The opinion also referred to a similar police regulation prohibiting the continuance of the operation of a livery stable within certain corporate limits. In sustaining the

lawfulness of these regulations, the Court refers with approval to a case, *Ex parte Kelso,* 147 Calif. 609:—

> "* * * wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco." (An ordinance, it will be noted, closely analogous to the regulations contained in Order L-208 of the WPB). "The court there said that the effect of the ordinance was 'to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of.' The court expressed the view that the removal could be regulated, but that 'an absolute prohibition of such removal under the circumstances,' could not be upheld.
>
> "In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into brick. * * * Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve." (id. pp. 411, 412).

In the case at bar, the sole property right owned by Petitioner was the right to mine gold, a right that could only be exercised at the spot where the mine was located. May it be said that to be deprived absolutely of this right for a period of over two and three-quarter years does not entitle the owner to just compensation under the Fifth Amendment?

The case of *Hirabayashi* v. *United States,* 320 U.S. 81 cited (R. 10), it is submitted, in no manner is analogous to the case at bar. The *Hirabayashi* case merely sustains the right of the United States in the protection of its property to prohibit, during the national emergency, persons of Japanese ancestry from entering military areas between the hours of 8 p.m. and 6 a.m.

The cases of *Woods* v. *Miller Co.*, 333 U.S. 138; and *Bowles* v. *Willingham*, 321 U.S. 503, cited (R. 10) involving, during a national emergency, rental control of property by the Government, are likewise in no sense in point as in these cases, while the owner of the property was restricted in his use thereof, he was at the same time receiving just compensation during the time that the control thereof was exercised by the Government.

As was said by Mr. Justice Holmes in the case of *Block* v. *Hirsch*, 256 U.S. 135, involving the regulatory provisions of the District of Columbia Rent Control Act, the Act provides:—

> "* * * machinery * * * to secure to the landlord a reasonable rent. * * * It may be assumed that the interpretation of 'reasonable' will deprive him in part at least, of the power of profiting by the sudden influx of people to Washington caused by the needs of the Government and the war, and thus have a right usually incident to fortunately situated property—of a part of the value of his property."

The case of *Yakus* v. *United States*, 321 U.S. 414; and *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, cited by the court below (R. 10) involve criminal liability for the violation of various price control provisions enacted by the Congress during the national emergency. As was said by Mr. Justice Roberts, in his dissenting opinion in the *Yakus* case:—

> "I am sure that my brethren, no more than I, would say the Congress may set aside the Constitution during war. If not, may it suspend any of its provisions? The question deserves a fair answer. My view is that it may not suspend any of the provisions of the instrument. What any of the branches of the government do in war must find warrant in the charter and not in its nullification, either directly or stealthily by evasion and equivocation. But if the court puts its decision on the

> warpower, I think it should say so. The citizens of this country will then know that in war the function of legislation may be surrendered to an autocrat whose 'judgment' will constitute the law; and that his judgment will be enforced by federal officials pursuant to civil judgments, and criminal punishment will be imposed by courts as a matter of routine." (321 U.S. 414, 460).

While in the *Steuart* case, 322 U.S. 398, 406, in sustaining penalties for violation of fuel oil regulations, the court says that:—

> "* * *. They sustain the conclusion that in restricting petitioner's quota the Office of Price Administration was doing no more than protecting a commodity against distribution which * * * measured by national standards was inequitable, unfair and inefficient * * *."

The case of *Ruppert* v. *Caffery*, 251 U.S. 264; and *Hamilton* v. *Kentucky Distilleries and Warehouse Co.*, 251 U.S. 146, cited (R. 10) were cases involving the wartime regulation of the use of liquor, regulations, while materially restricting the manufacture and disposal of liquor, did not completely prohibit either. As was pointed out in the *Kentucky Distilleries* case:—

> "There was no appropriation of the liquor for public purposes. The wartime prohibition act * * * permits an unrestricted sale for export, and, within the United States, sales for other than beverage purposes * * *." (251 U.S. 156, 157).

While in the *Ruppert* case the Court says:—

> "* * * there was no appropriation of private property, but merely a lessening of value due to a permissible restriction upon its use." (251 U.S. 264, 303).

It is not to be forgotten that to provide for a reasonably complete prohibition on the manufacture and sale of intoxicating liquors—a provision analogous to the provisions of

WPB Order L-208—it was necessary to adopt the XVIII Amendment to the Constitution. This Amendment, that gave liquor manufacturers a period of one year in which to dispose of their product, was repealed by the XXI Amendment, after being in force for about ten years.

As was said in the case of *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 85, 89, likewise cited (R. 10), in voiding an indictment of the grocery company for alleged violation of provisions of the Food Control Act of August 18, 1917, 40 Stat. 276, as amended—

> "* * * the decisions of this court indubitably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon * * *. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

The *Legal Tender* cases, 12 Wall. 457, 551; *Norman* v. *B & O. RR. Co.*, 294 U.S. 240, cited (R. 10, 11) are, it is submitted, not at all in point on the questions involved in the instant case, as they relate solely to the Constitutional power of the Congress alone "to coin Money, regulate the Value thereof, and of foreign Coin, * * *." (Constitution, Art. 1 Sec. 8, Cl.5.)

The case of *Louisville & Nashville RR Co.* v. *Mottley*, 219 U.S. 467 (R. 11), that involved the question of the constitutionality of the provisions of the Interstate Commerce Act of June 29, 1906 (34 Stat. 584), prohibiting common carriers in interstate transportation from granting other than uniform charge for transportation was held constitutional. It is difficult to see the application of the opinion

in this case to the case now before the court. The facts in the *Mottley* case may be briefly stated as follows:

The plaintiffs, Mottley and wife, were injured in an accident on the Louisville and Nashville Railroad in 1871. In the settlement for damages reached with the railroad company a lifetime pass entitling the injured parties to free passage on the railroad was agreed upon. The Interstate Commerce Act of 1906, however, prohibted the issuance of such transportation. The court in sustaining the constitutionality of the Act was careful to "express no opinion" on the question as to whether "the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the collision occurred * * *." (219 U.S. 467, 486.)

The case of *Mugler* v. *Kansas,* 123 U.S. 623 (R. 11, 12, 13) involved the constitutionality of an amendment to the Constitution of the State of Kansas prohibiting the manufacture and sale within the state of intoxicating liquors. This case is, it is submitted, likewise not in point with the case at bar. There would have been an entirely different question before the court in the case at bar, had there been involved either an amendment to the Constitution of the United States or an amendment to the Constitution of the State of California.

It is interesting to note in the *Mugler* case that Senator Vest, one of the attorneys, in the course of his argument as to the unconstitutionality of the amendment to the Constitution of the State of Kansas, expressed remarkable foresight as to where legislation of this character was leading the country. He said that—

> "The doctrines of the Commune give to the State the right to control the tastes, appetites and habits of the citizen. His dress, food, drink, domestic relations, are controlled and regulated by the State. 'The

State is everything, the individual nothing.' In order to make him a useful citizen and taxpayer, the State exercises a surveillance over all that he is and has.

"On the other hand, our system of government, based upon the individuality and intelligence of the people, does not claim to control the citizen, except as to his conduct to others, leaving him the sole judge as to all that only affects himself." (123 U.S. 623, 629.)

5

Damages

There is no question that Limitation Order L-208 was issued, that gold mines were forced to close under that Order, that this Petitioner, in compliance with that Order, closed its gold mining operations, or that, as a result thereof, Petitioner was forced to expend monies to protect its properties and has not since, by reason thereof, been able successfully to operate. The sole question presented is—"Is the Government obligated to compensate for that monetary loss, under the Fifth Amendment to the Constitution?"

If the Government of the United States is held by this Court not to be liable for the resultant damages to this Petitioner, because there was no physical taking, but only Regulation, then *Our Country* is indeed in a very sad state of affairs. This has been one of the great industries in Our Country. Gold is still the greatest medium of world exchange and the basis of our monetary system. If the gold mining industry is to be ruined by Executive Order, at the will of any President, or lesser executive, then our fight against Fascism and Naziism, in World War II, and our present struggle that self-determination, as against dictatorship, may be preserved is entirely meaningless, and the principles which we have consistently proclaimed are

merely principles. The damages—in terms of money—are still present to this Petitioner.

Conclusion

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted, in order that this Petitioner may receive the just compensation to which it is entitled under the Fifth Amendment to the Constitution.

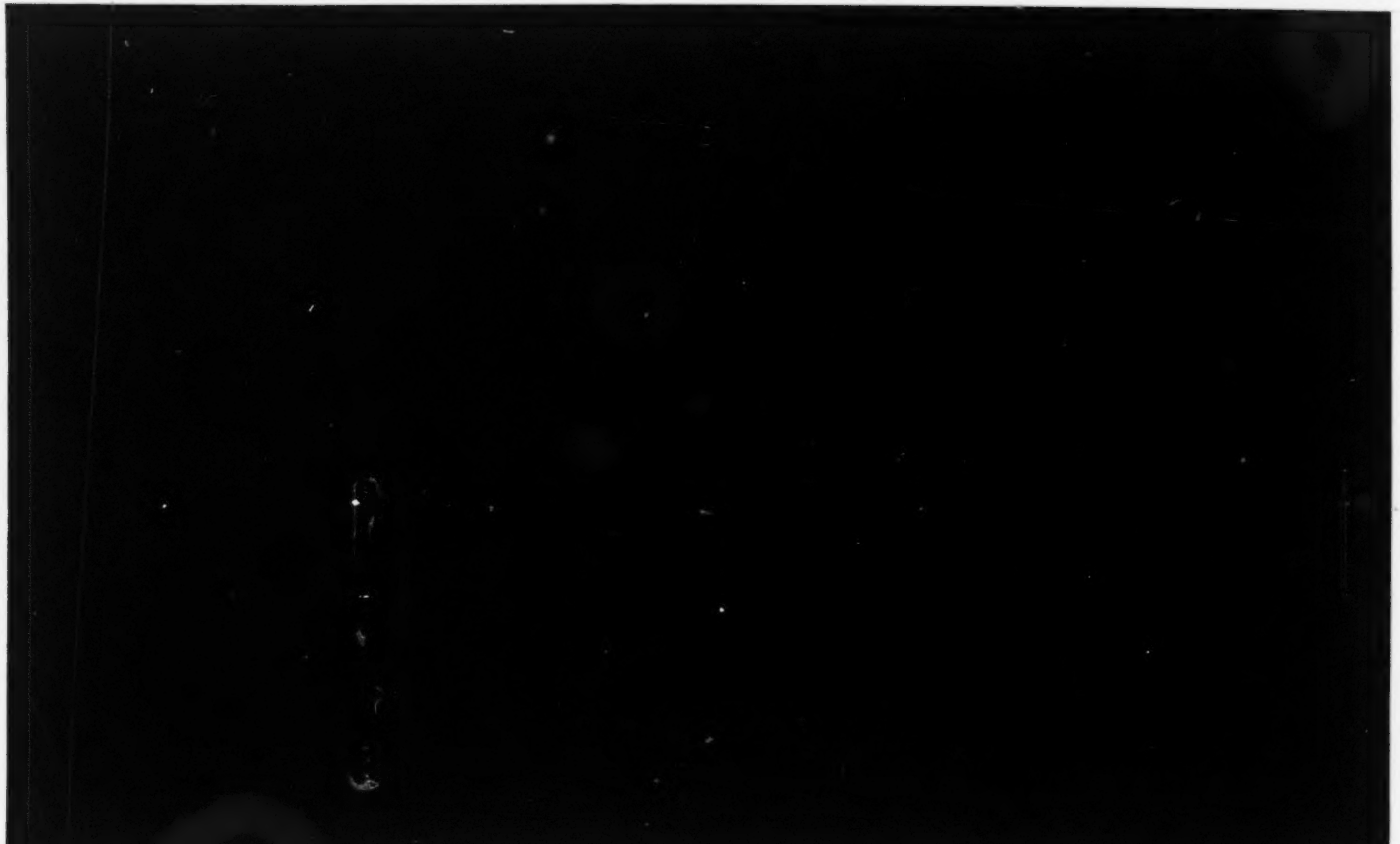
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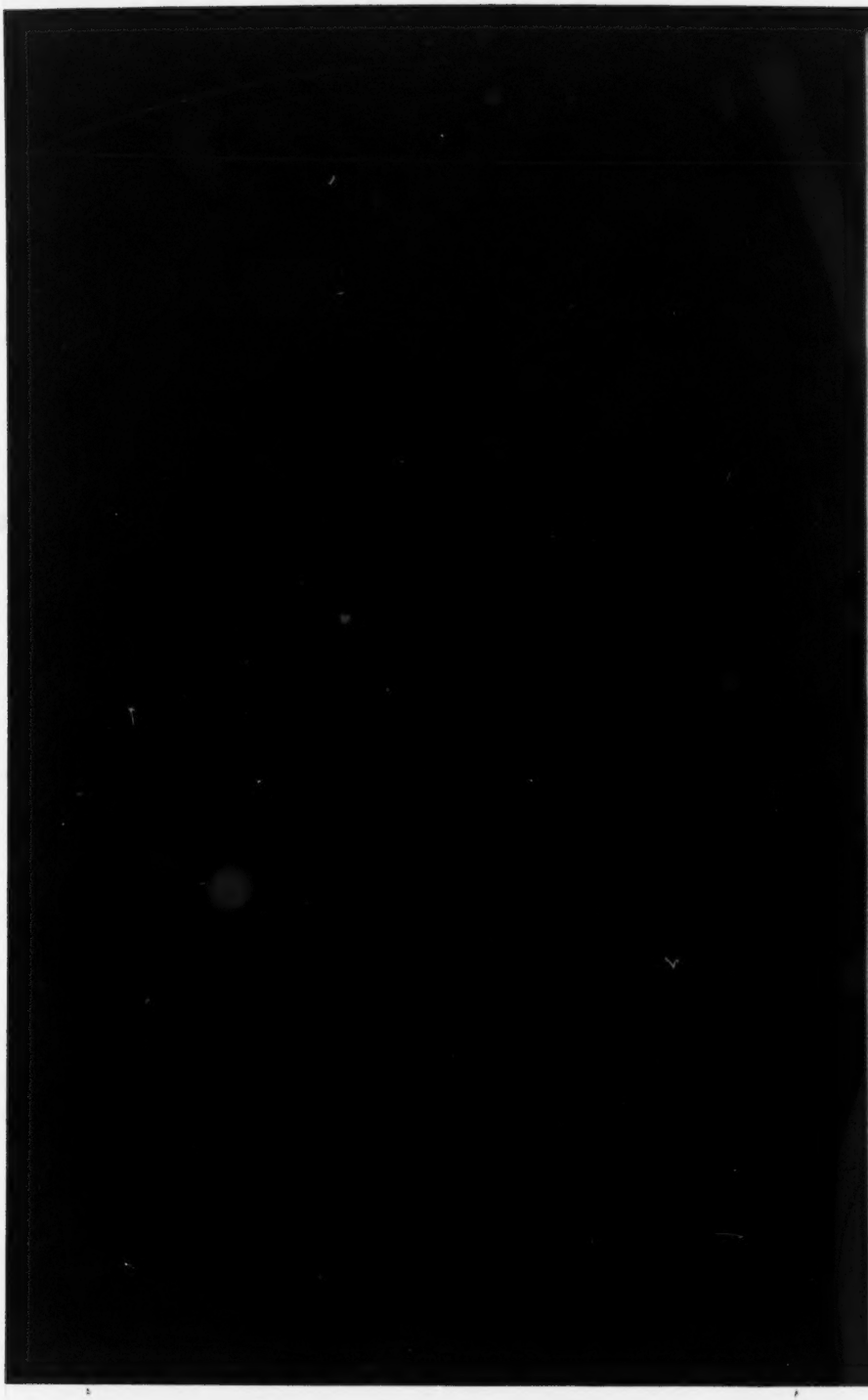
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APRIL 9, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 667

ORO FINO CONSOLIDATED MINES, INCORPORATED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 4–15) is reported at 92 F. Supp. 1016.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1950 (R. 4). Petitioner's motion for rehearing, filed on October 23, 1950 (R. 15), was overruled on January 9, 1951 (R. 15). The petition for a writ of certiorari was

filed on April 9, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether War Production Board Limitation Order L–208, which required petitioner, pursuant to valid delegation of the President's wartime authority to allocate critical material and facilities, to shut down the operation of its gold mine as a non-essential mine, resulted in a taking of the gold mine for which petitioner is entitled to just compensation under the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act (54 Stat. 676, as amended by 56 Stat. 177, 50 U. S. C. App. 633, 1152) and of WPB Limitation Order L–208 (7 Fed. Reg. 7992) are set forth in the Appendix, *infra*, pp. 18–21.

STATEMENT

By petition filed in the Court of Claims on February 8, 1950, Oro Fino Consolidated Mines, Inc., petitioner herein, sought to recover just compensation for an alleged taking of its gold mine located in Placer County, California (R. 1–3). The United States demurred (R. 3). The complaint alleged the following:

Petitioner, a Nevada corporation, is, and its predecessor in title J. C. KempvanEe was, the owner of mining rights in, and the operator of, a gold mining property located in the Ophir

Mining District, Placer County, California, known as the Oro Fino Mine (R. 1). Hazel P. Grindley, a widow, on September 5, 1935, leased the exclusive mining rights to this property to J. C. KempvanEe, who, in 1942, was engaged in the active and financially profitable operation of the property as a gold mining property, producing lode gold and employing from 30 to 40 miners (R. 1–2). On February 2, 1950, J. C. KempvanEe conveyed to petitioner all right, title, and interest in these mining property rights (R. 2).

On October 8, 1942, the War Production Board issued Limitation Order L–208 (7 F. R. 7992–7993.) Under this Order, petitioner's gold mining property was classified as a "nonessential mine" and petitioner was required immediately to "take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operation of said mine" (R. 2). Pursuant to this Order, petitioner was forced on January 18, 1943, despite its protests, to discontinue all mining operations on the property and completely to shut down the mine (R. 3). In shutting down the mine, petitioner took such steps, at its own expense, as it deemed proper for the protection of the property in a closed condition (R. 3). Limitation Order L–208 remained in force until revoked on June 30, 1945 (10 F. R. 8110) (R. 3).

As a result of the shut-down, petitioner "in

efforts to properly protect the property rights therein, has incurred large and continuous expense in a total sum in excess of $72,584.38" (R. 3). In its complaint, petitioner claimed that sum "as an element of just compensation for the damages sustained by it" as a result of compliance with Limitation Order L–208, and demanded that sum "together with just compensation for delay in payment, measured by interest at the rate of 6% per annum from July 1, 1945 * * *" (R. 3).

The Court of Claims unanimously sustained the demurrer of the United States (R. 15). In holding that petitioner's allegations failed to establish that its property had been taken, the court stated (R. 15):

> [Limitation Order L–208] was a regulation rather than a taking, a regulation which was permissible because the national safety demanded it, and which was valid under the war power. The United States cannot, therefore, be held liable to make compensation to one who was put to expense in complying with it.

Accordingly, it dismissed the complaint (R. 15).

ARGUMENT

Petitioner does not question that the power to allocate materials and facilities which the Congress by Section 2 (a) (2) of Title III of the Second War Powers Act, Appendix, *infra*, p. 18,

vested in the President, involves a constitutional exercise of the war power, or that the delegation of that power to the War Production Board and, in turn, to WPB's Director General for Operations,[1] was proper. Nor does it challenge the propriety or legality of Limitations Order L–208. Cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398. Rather, petitioner's claim is that the Order necessarily resulted in a taking compensable under the Fifth Amendment.[2] The decision below rejecting that claim, is, we submit, correct and in accord with established principles.

1. The restrictions imposed by Limitation Order L–208 on petitioner's use of its gold mine

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[1] Executive Order 9024 (7 Fed. Reg. 329); Executive Order 9040 (7 Fed. Reg. 527); Executive Order 9125 (7 Fed. Reg. 2719); P. D. Regulation 1 (6 Fed. Reg. 6680); WPB Regulation 1 (7 Fed. Reg. 561). See 7 Fed. Reg. 7992–7993, *infra*, pp. 18–21. It may be noted that none of these Executive Orders or regulations authorizes requisitioning.

[2] The complaint in the Court of Claims alleged that L–208 was issued "arbitrarily and without authority of law" (R. 2), and therefore in effect claimed that the asserted taking was unauthorized. The Government's demurrer questioned whether a complaint with such allegations stated a cause of action against the Government since "[a]cts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen." *United States* v. *Goltra*, 312 U. S. 203, 208; see also, *United States* v. *North American Co.*, 253 U. S. 330; *Hughes* v. *United States*, 230 U. S. 24, 35. The Court of Claims held that it was not bound by the fact that illegality is alleged in the petition; that the question of legality was a judicial function; and that it had no doubt as to WPB's competence to issue the orders (R. 9).

did not result in a taking of the mine but rather constituted a valid exercise of the war powers to allocate and control the consumption of critical materials. This limitation order was only one of hundreds of similar orders, affecting virtually all phases of industrial activity and businesses, which were issued by various agencies of the Government during World War II. These orders were designed to effectuate the distribution of scarce materials and products of all kinds among competing military and civilian demands, as well as to insure the prompt, efficient, and adequate flow of shortage materials to the armed forces, to our allies, and to the home front. In order to attain these objectives, it was often imperative to withdraw or reclaim allocations granted, or to reallocate because of a change in the military situation or legitimate consumer demands. See Brief for Respondents in *Steuart & Bro.* v. *Bowles,* No. 793, October Term 1943, pp. 18–21; O'Brian and Fleishmann, *The War Production Board Administrative Policies and Procedures,* 13 Geo. Wash. Law Review, 1, 7.

The conservation of critical materials for essential war uses was at least one of the prime purposes of L–208. This is manifest from (1) its preamble which states that the order is "deemed necessary and appropriate in the public interest and to promote the national defense," inasmuch as "the fulfillment of requirements for the defense of the United States has created a

shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines" (*infra,* p. 18), and (2) its provisions which, in addition to requiring the closing down of non-essential mines, forbid the operator of any non-essential mine "to acquire, consume, or use any material, facility, or equipment" for the purpose, either of commencing any new mining operation, or of continuing operations (*infra,* pp. 19, 20).

Under settled principles, such a prohibition on the use of critical materials and equipment in connection with gold mining—imposed for the express purpose of diverting them to more important and vital war uses—was plainly a valid exercise of the war powers, and not a taking compensable under the Fifth Amendment. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 405; *Gallagher's Steak House* v. *Bowles,* 142 F. 2d 530 (C. A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222 (C. A. 5), certiorari denied, 323 U. S. 749. In *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, this Court, in upholding the propriety of an OPA suspension order directed against a fuel oil dealer who had failed to comply with the fuel oil rationing regulations, commented (322 U. S. at 405):

> * * * Certainly we could not say that the President would lack the power

> under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business. * * *

On closely analogous facts, the Court of Claims made a similar ruling in *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari to review which was denied by this Court, 335 U. S. 815. In the *St. Regis* case, the War Production Board, acting pursuant to the same authority as in the instant case (see 7 Fed. Reg. 8424–8425), promulgated an order prohibiting pulpwood plants, such as that of the St. Regis Company, located in the Puget Sound area of the State of Washington, from consuming, processing or delivering any pulpwood except upon WPB's specific authorization. As a result, the St. Regis Company's plant remained closed during the period of the limitation order, since it had no raw materials on which it was permitted to

operate. In rejecting the St. Regis Company's claim that it was entitled to just compensation for the alleged taking of its plant, the Court of Claims stated (110 C. Cls. at 274):

> We do not think that the allegations in plaintiff's petition are sufficient under the limitations set out and defined in the decisions of the Supreme Court, this court and other courts of the country to establish such a taking.
>
> It is manifest from the allegations in the petition and the exhibits which are thereto attached, that there was a serious shortage of logs in the Puget Sound area; that according to the stated purpose of the restriction order immediate steps were required to reserve the remaining logs to insure uninterrupted production of highly essential nitrating and dissolving pulp; that the wood supply problem in the Puget Sound area was thoroughly studied by the Board and that it was found that the high operation rate in making nitrating and dissolving pulp made it necessary to curtail materially the use of logs of this type. When the petition and attached exhibits are construed as a whole, it is manifest that the action was taken as a defense measure.

2. Petitioner urges that these principles are inapplicable here, (a) because Order L–208, allegedly unlike other limitation orders, required virtually the entire gold mining industry to shut

down their operations (Pet. 5, 7), and (b) because, as a result of the shut-down of its gold mine, it sustained substantial expense and damages (Pet. 17–19, 29–30).

(a) Even if Order L–208 required most of the gold mining industry to shut down operations,[8] it does not follow that the *St. Regis* rule is inapplicable. While very few, if any, of WPB's other orders expressly required the shutting down of an industrial activity or an industry, the necessary effect of many of these orders denying allocations of critical materials was that the plant or industry would have to shut down operations. The results in both types of cases were, as a practical matter, frequently the same, with the difference between the express provisions of L–208 for the shut-down and the more common type of order denying allocations of critical materials being only one of language.

The identity of the two situations is easily demonstrable by reference to the *St. Regis* case itself. In that case, there was no requirement that the company shut down its plant; instead WPB denied it any allocation of pulpwood, the raw material which the plant was set up to process. The owner was left no choice but to

[8] So far as appears from the face of the Order, only those gold mines classified as "non-essential" were required to shut down, and even those were permitted partial operation in certain circumstances. See Sections 3093.1 (a), (b) (4), and (b) (5) of Order L–208, *infra*, pp. 18, 19, 20.

shut it down as a pulpwood plant. That such closing down was a necessary consequence of the denial of raw materials was recognized by the War Production Board, which in a letter refusing to grant to the Company authority to consume pulpwood, stated:[4]

> We are confident that you realize that *we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative.* Under existing conditions, however, we must confirm our decision to deny authorization to your Tacoma mill to consume any pulpwood logs during November. [Italics supplied.]

Moreover, the same closing of petitioner's gold mine would have taken place even if the express requirement as to the shut down had been omitted from L–208. The other provisions of the Order, forbidding any operator of a non-essential mine to acquire, consume or use any material, facility or equipment to start new operations and thereafter to conduct any operations at all (*infra,* pp. 19, 20), would, standing alone, necessarily have compelled the mine operator to shut down operations, in the same way as the plant owner in the *St. Regis* case was compelled to close down its plant. Thus, the specific shut-down provision of Limitation Order L–208 merely stated expressly what

[4] *St. Regis Paper Co.* v. *United States,* C. Cls. No. 47673, Record pp. 32–33.

was left implicit in the *St. Regis* order, and made plain what would have to happen, and did happen, in both cases. Consequently, the presence of the shut-down provision in Limitation Order L–208 does not, contrary to petitioner's contention (Pet. 19–20), distinguish this case from the type of limitation order involved in the *St. Regis* case.[5]

In both instances, the Government does no more than promulgate valid regulations; no property interest is taken. As stated by the court below, "the Government did not take over or use [petitioner's] land; it did not take any gold; there was as much gold in the Oro Fino mine on June 30, 1945, when Order L–208 was revoked, as there was on January 18, 1943, when the mine was closed. Title and possession remained in [petitioner]" (R. 14). There is a complete absence

[5] Even if the instant case were distinguishable from the situation which existed under the more general type of restriction order because of the difference in formulation of the restrictions, there would be no occasion for review by this Court. By virtue of that very distinction, the problem raised by this case would be of limited scope, since, according to petitioner, Order L–208 is the only one of its kind issued by the War Production Board. There are only two other pending cases involving the effect of Limitation Order L–208 (*Central Eureka Mining Co.* v. *United States*, C. Cls. No. 49468; *Alaska Pacific Consolidated Mines* v. *United States*, C. Cls. No. 49693), and even under what we regard as the overly liberal construction of the court below as to when the cause of action accrued (R. 5–7), the statute of limitations will, by June 30, 1951, bar the institution of additional suits.

of any allegation that petitioner's mine did not remain at all times within its own exclusive ownership, possession, and control or that the Government had any semblance of ownership, possession or use of the property. In the *St. Regis* case, the lack of such allegations was noted (110 C. Cls. at 278), and the Court of Claims stated that the United States plainly did not acquire any interest in the property, take over dominion and control, or appropriate to itself any right to use and enjoyment (*ibid*).

Since the Order was validly issued and there was neither a direct invasion of petitioner's property nor a physical taking over of any part of that property or of any right of dominion therein, the mine was not taken in the Fifth Amendment sense. *Transportation Co.* v. *Chicago,* 99 U. S. 635, 642; *Mugler* v. *Kansas,* 123 U. S. 623, 669; *Gibson* v. *United States,* 166 U. S. 269, 275–276; *Scranton* v. *Wheeler,* 179 U. S. 141, 154–155; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156–157; *Atwater & Co.* v. *United States,* 275 U. S. 188, 190–191; *Miller* v. *Schoene,* 276 U. S. 272, 279–280.* Neither all nor any part of petitioner's mine was destroyed, nor was its ex-

* Cases such as *United States* v. *Causby,* 328 U. S. 256; *Portsmouth Company* v. *United States,* 260 U. S. 327, and *International Paper Co.* v. *United States,* 282 U. S. 399, are all distinguishable since in each of those cases there was an actual taking by the Government of an interest in the claimant's property or a direct physical invasion of that property.

clusive possession or occupancy disturbed at any time during the period of the alleged taking. The interference with its operations resulted solely from the regulatory exercise of the federal power to allocate materials and supplies in time of war.[7]

(b) The fact that petitioner suffered damage and incurred expense does not, of course, serve to convert the requirements of Order L–208 from valid regulation to a Fifth Amendment taking. It is settled that damages or injury flowing from a valid exercise of the war powers need not be compensated. "It has been repeatedly held by the Supreme Court of the United States that when governmental powers are legitimately exercised for the public good, and the injury complained of is only incidental to their exercise,

---

[7] *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, relied on by petitioner (Pet. 7, 8–9), is inapplicable for a number of reasons. In the first place, the restriction in that case was for the particular benefit of a single private house, whereas here the restriction was clearly for the nation as a whole. In the second place, the restriction in the *Pennsylvania* case was permanent, while here the restriction was only for the temporary period of the shooting war. There was also some doubt, at that time, as to whether the police power stretched as far as the State in the *Pennsylvania* case sought to exercise it; here, as we have shown above, the restriction falls squarely within the wartime power to allocate and control the use and consumption of critical materials. Cf. R. 11–15. Finally, there is a great difference between a peacetime restriction of the *Pennsylvania Coal* type and a regulation directly designed to aid the prosecution of a war; many things can be done without compensation in times of war or emergency which would be questionable in periods of less stress.

there is no taking of property for the public use." *Morrisdale Coal Co.* v. *United States,* 55 C. Cls. 310, 316, affirmed, 259 U. S. 188; *Royal Holland Lloyd* v. *United States,* 73 C. Cls. 722; see *Block* v. *Hirsch,* 256 U. S. 135; *Bowles* v. *Willingham,* 321 U. S. 503; *Woods* v. *Miller Co.,* 333 U. S. 138; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 155–158; *Omnia Commercial Co.* v. *United States,* 261 U. S. 502; *United States* v. *Garver,* 278 U. S. 294; *Transportation Co.* v. *Chicago,* 99 U. S. 635.

This principle applies even where the exercise of the governmental power results in substantial injury to the property owner. Cf. *Miller* v. *Schoene,* 276 U. S. 272, 279–280. In the *St. Regis* case, the Court of Claims expressly recognized that the damages were "both real and substantial. But in the light of the decisions of the Supreme Court, the Tucker Act, and the established rules of law, this court does not have jurisdiction to grant the relief sought" (110 C. Cls. at 279). In *Mugler* v. *Kansas,* 123 U. S. 623, 669, and *Kidd* v. *Pearson,* 128 U. S. 1, the principle was applied where state statutes prescribing the operation of breweries for the manufacture of alcoholic beverages resulted in virtually wiping out the value of breweries. See, also, *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, 156–158; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 282.

In the present circumstances, since the injuries suffered by the petitioner were incidental to the over-all objective of so organizing our economy as to enable the United States to "wage war successfully" (*Home Bldg. & L. Ass'n.* v. *Blaisdell,* 290 U. S. 398, 426; *Hirabayashi* v. *United States,* 320 U. S. 81, 93; see *Lichter* v. *United States,* 334 U. S. 742), the resulting damages were "damnum absque injuria * * * private interest has merely come into collision with a public interest and has had to yield" (*Brown* v. *Wilemon,* 139 F. 2d 730, 732 (C. A. 5), certiorari denied, 322 U. S. 748; cf. *Gallagher's Steak House* v. *Bowles,* 142 F. 2d 530 (C. A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222 (C. A. 5), certiorari denied, 323 U. S. 749; *Gray* v. *Commodity Credit Corp.,* 63 F. Supp. 386, 396 (S. D. Cal.), affirmed, 159 F. 2d 243 (C. A. 9), certiorari denied, 331 U. S. 842; see also *Block* v. *Hirsch, supra; Bowles* v. *Willingham, supra; Woods* v. *Miller Co., supra*). As stated by this Court in *Lichter* v. *United States,* 334 U. S. 742, 754:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes

his traditional sacrifices of comfort, security and life itself.[8]

CONCLUSION

The decision below is clearly correct and there is no conflict with any applicable decision of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY, 1951.

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[8] Several bills have been introduced in Congress—but failed of passage—to compensate the owners of the gold mines affected by Order L–208. H. R. 4393, 79th Cong., 1st sess.; H. R. 950, 80th Cong., 1st sess.; S. 45, 81st Cong., 1st sess.; see, also, S. 27, 80th Cong., 1st sess.; Sen. Rep. No. 4, 80th Cong., 1st sess. It is interesting to note that these bills proposed to allow the mine owners to file claims for the amount of their losses with the Secretary of Treasury, who, upon certification of an examiner appointed by him, was to pay the claims as allowed. Nothing in these bills suggested that the mine owners affected by L–208 could recover their losses by suit in the Court of Claims for a taking under the Fifth Amendment. Indeed, the clear implication of the proposed bills was to the contrary.

APPENDIX

1. The Second War Powers Act, 54 Stat. 676, as amended by 56 Stat. 177, 50 U. S. C. App. 633, 1152, provides in pertinent part:

> SEC. 2. (a) * * *
>
> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

2. Limitation Order L–208 of the War Production Board (7 Fed. Reg. 7992–7993) provides in pertinent part:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.
>
> § 3093.1. *Limitation Order L–208*—(a) *Definitions.*—For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the

United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P-56.

(b) *Restrictions upon production.*—(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1,200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1,000 cubic yards of material in the year 1941, provided that the

rate of treatment of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(c) *Restrictions on application of preference ratings.*—No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.*—The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

* * * * *

(j) *Appeal.*—Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for

Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of priorities regulations.*—This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amendeud by Pub. Laws 89 and 507, 77th Cong.)

Issued this 8th day of October 1942.

ERNEST KANZLER,
Director General for Operations.

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 867

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

ORO FINO CONSOLIDATED MINES, INCORPORATED,
Petitioner,

v.

THE UNITED STATES.

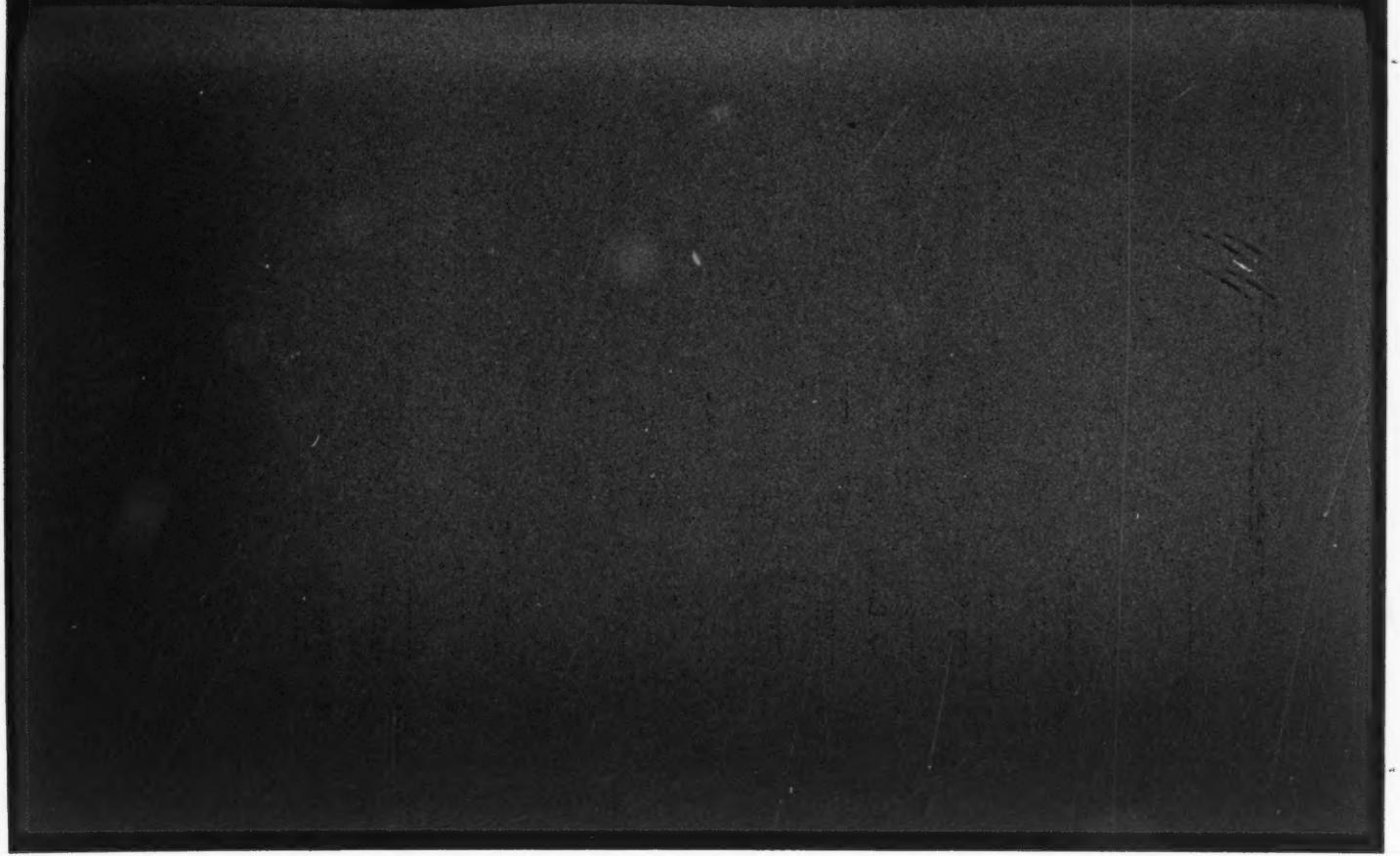
ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF THE PETITION

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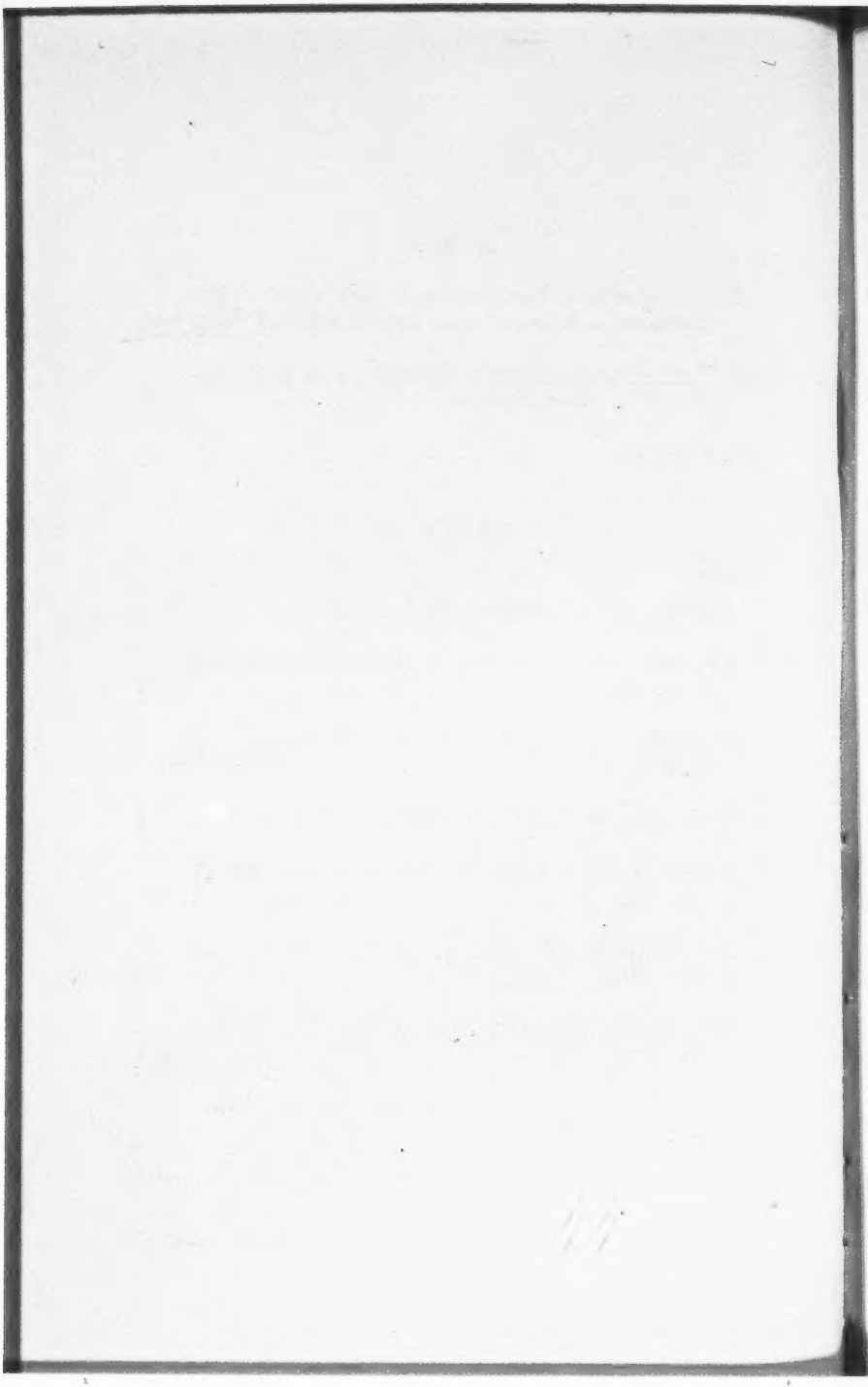
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IN THE

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REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF THE PETITION

I.

The Question Involved Is of Such National Importance As To Require the Granting of the Writ.

The Brief for the United States in Opposition is not addressed to the "Reasons for Granting the Writ" (Brief, 4-6), but is addressed solely to the *merits* of the fundamental question involved—Was there a confiscation of

property, for which just compensation is due, under the Fifth Amendment to the Constitution, when there was no physical taking of the property, but when an owner of the property was so deprived of its only use, for the benefit of the public, that the owner could make no use of the property at all—to its pecuniary loss?

The Writ should, therefore, be granted, so that this question may be answered by this Court for the benefit of Congress, as well as the public.

If this question had been previously answered, there being innumerable decisions involving the Fifth Amendment to the Constitution, then there was no occasion for the granting of the Writ, in the case of *The United States, Petitioner, v. Peewee Coal Company, Inc.*, 71 Sup. Ct. Rept. 670, upon application of the United States, and the divergent views of Justices of this Court in reaching the final conclusion affirming the decision of the Court of Claims.

Actually, the specific question involved herein has never been completely decided by this Court and is of extreme national importance.

Congress, during the last generation, at the request of the Presidents and to meet innumerable national emergencies, has either passed laws which transcended the bounds of the Constitution, or has given to the Executive branch powers over the individuals which would have made Hamilton succumb to the position of Madison respecting the use of Federal power for the general welfare, had he thought such laws would ever be passed.

Several times, this Court has had to say that the Constitution could not so be flaunted, or has required just compensation under the Fifth Amendment to the Con-

stitution. Order L-208 involved herein is well within this category of powers, as exercised upon the property of this Petitioner, which require compensation under the Fifth Amendment.

In the Brief in Opposition, page 6, the Government says that the limitation order involved—L-208—was "only one of hundreds of similar orders, affecting virtually all phases of industrial activity and businesses". For that reason, apparently, the action taken is to be condoned. Then, at page 12, note 5, the Government, at least *arguendo,* accepts Petitioner's statement, which is true, that L-208 was the *only* order of its kind issued—which shut down completely a small, but important, industry and forced—not as an incident but directly—this Petitioner to go out of business, for the asserted benefit of the public. Then, the Government suggests that, as there are only two other such cases pending and the statute of limitations will expire by June 30, 1951, the question is not of general importance.

The tenor of the Brief of the United States in Opposition, stated simply, is that the Government, in time of national emergency, can do anything to an individual, or to his property, by order or regulation, short of actually "taking" his property, for the benefit of the Nation, without being obligated to make any compensation whatsoever.

That is a typical totalitarian doctrine. That, in itself, is a question of national importance, which the people have the right to have answered. What was done to the Gold Mining Industry—by Order L-208—could be done to newspapers, or to any other industry.

The Respondent, except by footnote, has not dared to suggest that this question is not of national importance, because it is.

For the reasons given, at pages 4 to 6 of the Brief, the Writ should be granted.

II.

The Decision Below Is Incorrect and Is in Conflict With Other Decisions.

The decisions relied upon by the United States involve *some* degree of control, *some* degree of regulation, or the paramount right of the Government to use underwater lands for the purpose of improving navigation, without being required to make compensation to the abutting upland, but they do not, in any case, involve such a control, or regulation, as to constitute a "taking" of property (other than for the improvement of navigation), a fact present in this case. The other cases are cited to support the conclusion that there must be a direct invasion of property or physical taking over of it, to give rise to a claim for which the United States must make compensation under the Fifth Amendment. Relying upon these cases, the United States suggests that the decision below is correct and that it does not conflict with any applicable decisions of this Court.

The case of *Pa. Coal Company* v. *Mahon*, 260 U. S. 393, is completely contrary to both groups of cases cited by the United States, and to the conclusions drawn from them.

There, we find no physical taking, but a regulation, pure and simple, which was held to go so far as to constitute a "taking". (Brief, p. 8-9.)

There was no "taking" in *Hadacheck* v. *Sebastian*, 239 U. S. 334 (wherein Ex parte Kelso, 147 Cal. 609 is cited

with approval). In *International Paper Co.* v. *United States,* 282 U. S. 399, it was more a degree of interference than a taking. Again, in *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, while there was a taking of the laundry, for which rent was paid, there was no taking of the "routes", for which compensation was paid under the decision of this Court. It was the damage to the owner for being deprived of the use of its routes, for which this Court ordered compensation.

The ultimate conclusion reached by the Court of Claims in *Royal Holland Lloyd* v. *United States,* 73 Ct. Cl. 722, should have been applied to this case.

In the *Royal Holland* case, the plaintiff was merely refused clearance papers for a period of time. When the ship was seized, the owner was paid. The Court awarded a sum for damages to the owner for detention of the vessel, because the owner was deprived of its use prior to seizure. No one benefited, but the owner sustained a pecuniary loss. So, in the instant case. The two cases are decided parallel. It is hard to conceive that this Court would ever find greater rights, under the Constitution, in favor of foreigners, than those of ordinary American citizens.

St. Regis Paper Co. v. *United States,* 110 Ct. Cl. 271, cert. den. 335 U. S. 815, is cited by both parties. Petitioner urges that one of two things is true, either it is distinguishable, as urged by Petitioner in its Brief, or it is as wrong as the decision below in the subject case.

It is distinguishable for three very important reasons. It is obvious from the decision in the *St. Regis* case that the plant which the owner closed could be used for more than one purpose. In fact, when not allowed to make kraft pulp, it requested permission to use the plant to make nitrating pulp or multiwall bags for civilian and

war uses, a very different use of the property to which it could be put. The plant could undoubtedly have been used for other purposes. The gold mine of this Petitioner could be used for only one purpose—to mine gold, and Petitioner was prohibited from putting the mine to that single use. Furthermore, *St. Regis Paper Co.* was not ordered to shut down its plant. It was free to operate it for any purpose other than the restricted purposes. Petitioner, by Order L-208, was ordered to shut down its mine, to cease to operate its property, for the only purpose to which it could be put—mining gold.

One end sought—and one result of Order L-208—was to draft men for the copper mining industry indirectly—which could not be done directly. The other result was to deprive Petitioner of the sole use to which its property could be put for the benefit of the general welfare, to the pecuniary loss of this Petitioner. This was also the *direct end* sought by Order L-208. It was not merely an incident thereto, as was Order M-251, involved in the *St. Regis* case, a third, and important, distinguishing feature.

However, if the two cases be held similar in effect, which Petitioner strongly urges is not the fact, then both decisions are wrong.

The Government may not, under the guise of a regulation, order an industry, or one segment of it, to close its doors completely, directly or indirectly, without that act amounting to a taking of property, for which compensation is required under the Fifth Amendment to the Constitution.

The fact that *certiorari* was not granted in that case is not significant. The cases are distinguishable. Even if held not to be, this Court has since granted a writ in one of the two important Government control cases,

The United States v. *Peewee Coal Co., supra,* and should grant a writ in this case, so that we may know to what extent the Government is going to be permitted to go to control the lives of its people and the industry of the country in the name of the general welfare.

The fact that the Government did not acquire any interest in the property—either in the *St. Regis* case, as noted by Respondent, at page 13, or in this case, is of no importance whatsoever. The test is loss to the owner, not gain to the Government. The *United States* v. *Peewee Coal Co., supra, Kimball Laundry Co.* v. *United States, supra, Royal Holland Lloyd* v. *United States, supra.*

III.

Damages.

The subject case is well within the opinion of the majority as well as of the dissenting Justices in *The United States* v. *Peewee Coal Company, Inc., supra.* In that case, the dissenting Justices objected to the conclusions of the majority because they were of the opinion that it had not been found that the Government had taken something of compensable value from the company, *"or that the Government subjected the company to any pecuniary loss"*. In the subject case, the Government very definitely subjected the Petitioner to pecuniary loss—the cost of keeping up a property completely shut down by order of the Government. This was a definite and real "loss to the owner", in the sum of $72,584.38. This entire Court could readily reverse the Court below upon the basis of the opinions in the *Peewee Coal* case.

Petitioner is not seeking compensation for loss of profits, something present in other war cases, relied upon by the United States. Petitioner claims damages in the sum of $72,584.38, only on account of the actual expense to which it was put to conserve its property, by reason of the fact that the Government ordered it to close down its every operation, for the benefit of the general welfare. This amounted to a "taking", for which the Fifth Amendment requires the compensation claimed.[1]

Respectfully submitted,

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Of Counsel.

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[1] The fact that Bills introduced in Congress have provided that Petitioner and others be permitted to be paid by the Treasury Department rather than be forced to go to the Court of Claims, (Resp. Brief, p. 17, Note 8), is by no means an implication that Congress believed that there was no legal remedy under the Fifth Amendment to the Constitution. Rather is the implication that certain members of Congress sought to provide compensation for all of the mine owners rather than require that each be forced to sue to recover.